

No. 50238-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PRESTON, Jr.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 15-1-00433-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence to support Preston's conviction for theft in the second degree.

2. Whether the State presented sufficient evidence to support Preston's conviction for trafficking in stolen property in the second degree.

3. Whether the court should consider alleged errors in definitional jury instructions for the first time on appeal.

4. Whether the trial court's use of instructions based on the Washington Pattern Jury Instructions properly instructed the jury as to the applicable law.

5. Whether any error in defining terms in the elements of the offense was harmless.

6. Whether the prosecutor committed misconduct by arguing the facts and rational inferences therefrom to show that Preston had knowledge that the ring was lost or by making arguments regarding reasonable doubt.

7. Whether Preston received effective assistance of counsel at trial based on tactical decisions.

8. Preston argues that because he was found indigent at trial, appellate costs should not be imposed. The State does not object.

B. STATEMENT OF THE CASE.

On February 18, 2015, Nicole Amacker went to the Tumwater Walmart, in Thurston County, Washington, in the evening hours. 1 RP at 35. Amacker was wearing a fuzzy, red, plaid and black sweater. 1 RP at 35. In the Walmart parking lot,

Amacker stopped to assist a man who had trapped his dog inside and locked his keys in his car. While assisting, Amacker took her ring off to stick her hand through the window. 1 RP at 36.

The ring was Amacker's wedding band that she and her husband had purchased at Ben Bridge. The ring was two pieces, soldered together of white gold, and had a Celtic style band with three diamonds, one large in the center and two smaller to the side. The ring was purchased for \$3200. 1 RP at 38. After trying to help the man get his dog out of his car, Amacker forgot to put the ring back on and went into the Walmart. 1 RP at 36.

Inside the Walmart, Amacker looked around a little bit, stopped a couple of places, went past the jewelry counter and left. 1 RP at 42. Less than an hour after leaving Walmart, Amacker noticed that her ring was gone. She called the Walmart and her husband, Michael went back to the store. 1 RP at 43. Within a couple of days, Amacker was able to view a video from Walmart. 1 RP at 44. Looking at the video, Amacker noticed that her ring was stuck to her sweater while she was in the Walmart. 1 RP at 49.

After realizing that her ring was gone, and checking with Walmart, the next day, Amacker posted two ads on Craigslist saying lost ladies wedding band at Walmart and the description of

the ring. The ads offered a reward. 1 RP at 50. Within a short time frame, which Amacker thought was somewhere around February 20th, Amacker's husband received a call from a woman and Amacker was able to contact her. 1 RP at 51. The woman put Amacker in contact with a man who identified himself as Michael Preston, Jr. Preston said that he had found the ring and had pawned it the next day because he needed car parts. 1 RP at 52-53.

Preston told Amacker that he pawned the ring at Tumwater pawn and said that his girlfriend made him call. 1 RP at 53. The conversation turned to the question of how the ring could be taken out of the pawn shop and Preston indicated that he did not have the money anymore and could not get to the pawn shop. 1 RP at 55-56. Amacker offered to pay for gas money or to pick up Preston. She also offered to pay the initial fee, but indicated that would have to come out of the reward. 1 RP at 56.

At that point, Preston's demeanor changed. He got upset that the money to get the ring out of the pawn shop would come out of the reward. Amacker offered to pay to retrieve the ring herself and indicated that she just had to have him there with his photo and Preston was not willing to go to the pawn shop. 1 RP at 57.

Amacker indicated that Preston indicated “he didn’t understand why he was going to become a victim of a lost reward money,” to which Amacker indicated that she would pay to get the ring out and would give him the remainder of the reward, but Preston did not want to do that because “he wanted the full amount of the reward money and for [Amacker] to pay to retrieve it out.” 1 RP at 58.

Amacker eventually said that she would need to file a police report and Preston ended up hanging up the phone. Amacker indicated that she talked with Preston on the phone twice. 1 RP at 59. Amacker never gave Preston permission to take or keep her ring. 1 RP at 63.

Barney McClanahan, the owner of Tumwater Pawnbroker, testified that Preston had pawned a 14 karat gold diamond ring on February 19, 2015. 1 RP at 73. The ring was pawned for a loan in the amount of \$175. Pursuant to the pawn agreement, it would cost \$199.25 to retrieve the ring in the first 30 days, \$204.50 to retrieve the ring in the second 30 days, and \$209.75 to retrieve the ring within 90 days. 1 RP at 77.

McClanahan identified Preston in open court as the person who had pawned the ring. 1 RP at 81-82. Preston said that the ring belonged to his girlfriend in Texas, and he had to come back

and get it. 1 RP at 90. Preston was given cash in the amount of \$175 and a copy of the loan contract and left the pawn shop. 1 RP at 87-88. McClanahan indicated that the pawn value of the item is not the actual value of the item and with jewelry there is an 800 to 2000 percent markup when compared to a jewelry store value. McClanahan explained that he looks at the worst case scenario if he has to scrap the ring wholesale with the gold to a scrapper and the diamonds to a diamond buyer. McClanahan agreed that the \$3200 purchase price would be the market value. 1 RP at 93-94.

Lieutenant Bruce Brenna of the Tumwater Police Department was dispatched to investigate the lost ring that had been pawned at the Tumwater Pawn Shop. 1 RP at 97. While Brenna was at the Pawn Shop, dispatch informed him that Preston had called to speak with him. 1 RP at 99. As part of his investigation, Lt. Brenna obtained a copy of the pawn shop's surveillance video and the pawn ticket. 1 RP at 99. Lt. Brenna also viewed the Walmart surveillance video. On the video, Lt. Brenna observed Amacker walk in the store and pause briefly at one of the center displays. Lt. Brenna indicated,

"Then there's about 12 or 13 minutes that go by with just general foot traffic through the store and then an individual can be seen approaching from the opposite

direction with a shopping cart, stops near the same display. Bends over and picks something up, is seen kind of looking around, moves with the cart and actually at one point appears that he's going to enter one of the checkout lines, then turns around, goes back towards the jewelry counter, is there for a moment, turns, and then leaves the store."

1 RP at 103-104. Lt. Brenna identified Preston as the individual in the video. 1 RP at 104. Preston did not contact anyone in the store in regard to what he had found. 1 RP at 105. The Walmart video was admitted as State's Exhibit 32 and published to the jury. 1 RP at 147.

While conducting his investigation, Lt. Brenna called Preston from his car in the parking lot of the pawn shop. 1 RP at 113. Preston told Lt. Brenna that he had found the ring at the Walmart and initially thought it was fake. He said that he found it on the 18th at about 6:30 near a display by the jewelry counter. 1 RP at 114. Preston said that he left Walmart and showed the ring to a lady friend of his who suggested that he take it to the pawn shop to see what it was worth. Preston told Lt. Brenna that he did that and ended up pawning the ring for \$175. 1 RP at 115.

Preston told Lt. Brenna that he asked his lady friend to check Craigslist to see if anybody had put a flyer or any type of note about losing a ring on there and she had found the page that Amacker

had put on there and he called and advised Amacker of where the ring was. Id. When asked why he did not turn the ring into Walmart, Preston said that it was flashier than what they had in the display and that he needed money for car parts so he kept the ring. RP Vol. 1, 116. Preston said he pawned the ring on the 19th, the day after. Id.

Preston made statements to Lt. Brenna indicating that Amacker had lost the ring so it wasn't hers, and that basically he had found it and so it was his property. 1 RP at 118. Preston eventually hung up on Lt. Brenna. 1 RP at 117.

Preston testified on his behalf. He indicated that he found the ring underneath one of the center bins. 2 RP at 10. He admitted that he pawned the ring at Tumwater Pawn, but stated,

"I wanted to see how long I could hold it and, you know, seeing how much, if it was real, and the next thing I had to contemplate was, you know, to try to find the owner, you know, if it was real it's obviously missing, you know, might be missing, so I was like."

2 RP at 13. He indicated that he received \$175 for the ring from the pawn shop. 2 RP at 14. When asked by defense counsel if he needed the money for something in particular, he responded, "Not really. But you know, I needed—I was going to be needing it trying to find the owner." Id.

When asked by his attorney if he had been interested in the reward, Preston stated, “No, only as a means to try to get it back to her.” 2 RP at 17. On cross examination, Preston testified that after picking up the ring, he had a flashback, stating, “I had PTSD and it was about when I had lost my ring in my first marriage trying to assist a woman who was broke down at night.” 2 RP at 24. When the prosecutor explored his motivations in keeping the ring, he said that he “held the ring” and indicated that he pawned the ring “to hold it until—because...it’s the safest place...Plus if I find the owner I can give them the pawn ticket number.” 2 RP at 26.

When asked what efforts he took to return the ring at the Walmart, Preston stated, “I kind of lost track what I was doing and I was suffering—about to suffer emotional breakdown and needed to gather myself,” and later testified that “I kind of blacked out on all that during that time.” 2 RP at 31.

On March 31, 2015, Preston was charged with trafficking stolen property in second degree and theft in the third degree. CP 4. On July 18, 2016, a hearing was scheduled and Preston was required to appear at nine o’clock. 1 RP at 152-154. Senior Deputy Prosecuting Attorney Mark Thompson was present in court on July 18, 2016. 1 RP at 182. Preston did not answer the call of

the court on that day. 1 RP at 190. Thompson testified that Preston did not ever show up for the hearing. 1 RP at 192.

At trial, Preston was convicted of trafficking stolen property in the second degree, theft in the second degree and bail jumping. CP 119. This appeal follows.

C. ARGUMENT.

1. The State presented sufficient evidence to convict Preston of Theft in the Second Degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The crime of theft in the second degree requires the State to prove that the defendant commits theft of property or services

which exceeds seven hundred fifty dollars in value. RCW 9A.56.040(1)(a). Theft, as applied to the facts of this case, means “to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.010(1)(c).

Here, there was ample evidence for a rational trier of fact to conclude that Preston appropriated the lost ring of Amacker, with intent to deprive her of such property. Preston picked up the ring in the Walmart and made no efforts to locate its true owner. 1 RP at 103-104. Within a day, he pawned the ring for \$175. 1 RP at 115. He further demonstrated his intent to deprive Amacker of the value of the property by not cooperating with her attempts to retrieve the item from the pawn shop. 1 RP at 57-58. Amacker testified that the ring had a value of \$3200 and Barney McClanahan, the pawn shop owner, agreed that would be the fair market value. 1 RP 38, 93-94. Further, McClanahan testified that the jewelry store value would be 800 to 2000 percent of the pawn loan value. 1 RP 93. Simple math shows that based on McClanahan’s valuation the ring would have had a value between \$1400 and \$3500.

Preston argues that the State failed to prove beyond a reasonable doubt that Preston knew the ring was lost or mislaid

stating “the State’s evidence established only that Mr. Preston picked up a ring he found on the floor and about which he knew nothing.” Brief of Appellant at 13. In addition to the act of picking up the ring off the floor of a Walmart store, looking around, and then leaving the store without notifying anybody of the find, there was ample evidence that would support a rational inference that Preston knew the ring was lost.

First, Preston indicated that he wanted to find the owner and tried to look on the internet and a third party was able to find the Craigslist ad. 2 RP at 29. When Preston pawned the ring, he did hide the fact that he had found a lost ring and told McClanahan that the ring belonged to his girlfriend in Texas. 1 RP at 90. A rational inference can be drawn from Preston’s deception, that he knew that the ring was lost and he did not have an ownership interest in it. In addition, Preston’s own testimony established that he knew the ring was lost. When asked, “So you found something that somebody had lost, correct,” Preston responded “I’m believing that, yes, at that point initially.” 2 RP 30.

There was overwhelming evidence presented at trial such that, taken in a light most favorable to the State and considering all rational inferences therefrom, any rational trier of fact could

conclude that Preston knew that the ring was lost. Twelve jurors came to that conclusion and the evidence supports their conclusion.

2. The State presented sufficient evidence to convict Preston of the crime of Trafficking in Stolen Property in the Second Degree.

The crime of trafficking in stolen property in the second degree requires the State to prove that the defendant recklessly trafficked in stolen property. RCW 9A.82.055(1). Here, there is overwhelming evidence that Preston trafficked stolen property when, less than one day after finding Amacker's lost ring, he pawned it at Tumwater Pawnbroker.

Traffic means to sell, transfer, distribute, dispense, otherwise dispose of stolen property to another person. RCW 9A.82.010(19). A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard is a gross deviation from conduct that a reasonable person will exercise in the same situation. RCW 9A.08.010(1)(c). Evidence that a defendant knowingly pawns stolen goods is sufficient to support a charge of trafficking in stolen property. State v. Michielli, 132 Wn.2d 229, 235, 937 P.2d 587 (1997); see also, State v. Hermann, 138 Wn.App 596, 604, 158 P.3d 96 (2007).

“Stolen property” means property that has been obtained by theft, robbery, or extortion. RCW 9A.82.010(16). For the same reasons that sufficient evidence exist to support Preston’s conviction for theft in the second degree, sufficient evidence was presented at trial to demonstrate that Preston knew that the ring was stolen. Knowing that the ring was the lost property of another, within one day of finding the ring and without attempting to contact anyone about finding the ring, Preston recklessly used it as collateral for a loan at a pawn shop. In a light most favorable to the State, sufficient evidence was presented to support Preston’s conviction for trafficking in stolen property in the second degree.

3. Definitional jury instructions should not be questioned for the first time on appeal.

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a “manifest error affecting a constitutional right.” Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. “On the other hand, ‘permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is

wasteful of the limited resources of prosecutors, public defenders and courts.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

RAP 2.5(a) concerns errors raised for the first time on appeal:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of construction require that the term “manifest” in RAP 2.5(a)(3) be given meaning. . . . As the Washington Supreme Court stated in State v. Scott, [*supra*, at 687] “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992).

We agree with the court of Appeals that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can “identify a constitutional issue not litigated below.”

Scott, *supra*, at 687. The Lynn court described the correct analysis

in these steps:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. . . . “[M]anifest” means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. “Affecting” means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

Lynn, 67 Wn. App. at 345.

Where an element of the charged offense has been omitted from the jury instructions, or a requirement for conviction is not clearly stated, a constitutional due process issue is presented. State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn.2d 707, 887 P.2d 396 (1995). An error in defining terms used in the elements of a crime is not of constitutional magnitude as long as the instructions properly inform the jury of the elements of the crime charged. State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). If an instruction can be construed as

relieving the State of its burden of proof, that can be a constitutional error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The State does not concede that any error occurred in the trial court's instructions to the jury. Preston's argument centers on a failure to provide an additional instruction defining lost, mislaid and abandoned property and argues that the trial court in some way relieved the burden on the State by not doing so. Not every term needs to be defined in order for a jury to adequately consider the law.

Preston's argument that the legal definition of lost somehow differs with the colloquial meaning of lost is without merit. The word "lost" is defined as beyond the possession and custody of its owner and not locatable by diligent search. Bryan A. Gardner et al, Black's Law Dictionary, 1089 (10th ed. 2014). "Lost property" is defined as "property that the owner no longer possesses because of accident, negligence, or carelessness, and that cannot be located by an ordinary, diligent search." Id. at 1411. Preston cites to State v. Kealey, 80 Wn.App. 162, 907 P.2d 319 (1995), for the proposition that "lost property" means that the owner parted with possession of the ring unwittingly and no longer knew its location. Brief of Appellant at 12-13.

In Kealey, the court considered whether a person has a reasonable expectation of privacy in a purse that was misplaced in a department store. State v. Kealey, 80 Wn.App. at 164. The court held that the defendant “reasonably expected that her purse would remain private..[and] that police may search misplaced property for identification without a search warrant.” Id. In reaching that conclusion, the Court noted differences in a person’s expectation of privacy when property is abandoned, rather than lost or mislaid. Id. at 172. The court specifically stated, “at common law, one does not relinquish ownership in goods by losing or misplacing them: ‘finders keepers, losers weepers’ is a time-worn old saying, but not true.” Id. Kealey did not discuss jury instructions and nothing in that court’s discussion of lost, mislaid, or abandoned property significantly differs from a common understanding of what those terms mean.

It cannot be said that a failure of the trial court to further instruct the jury rises to an issue of constitutional magnitude. State v. Stearns is instructive on this issue. In Stearns, the court considered an argument that the trial court should have included language that repackaging drugs does not constitute manufacturing when the trial court instructed the jury on the definition of

manufacturing. 119 Wn.2d at 249. The court noted that the elements of the crime were straightforward, and the trial judge properly instructed the jury as to the elements of the offense. *Id.* at 250. The court found that “any error in the instruction defining the term manufacture is not error of constitutional dimension,” and found that Stearns had not met the requirements of RAP 2.5 (a) and was not entitled to appellate review. Stearns, 119 Wn.2d at 250-251.

Preston makes a similar argument, asking this court to review for the first time on appeal definitional jury instructions. Preston is not entitled to appellate review on this issue.

4. The trial court properly instructed the jury as to the applicable law in this case.

The trial court’s instructions to the jury were consistent with the applicable law and allowed both parties to argue their theory of the case. There was no error in the instructions.

Jury instructions are reviewed *de novo*. Instructions suffice when, “they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied.” State v. Donery, 131 Wn.App. 667, 674, 128 P.3d 1262 (2006). Trial courts must define technical

words and expressions used in jury instructions. State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007 (1998). The court does not have to define expressions which are commonly understood. State v. Humphries, 21 Wn. App. 405, 411, 586 P.2d 130 (1978). Whether words in an instruction require definition is necessarily a matter of judgment of the trial judge. *Id.* at 411; citing Seattle v. Richard Bockman Land Corp. 8 Wn.App. 214, 505 P.2d 168 (1973).

In this case, Preston specifically takes issue instructions 13, 14, and 20. Instruction 13 read,

Theft means to appropriate lost or misdelivered property of another, or the value thereof, with intent to deprive that person of such property.

CP 94; 2 RP at 83. This instruction is based on the applicable bracketed language in WPIC 79.01. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 79.01 (4th Edition, 2016), at 199.

Instruction 14, read,

“Appropriate lost or misdelivered property” means obtaining or exerting control over the property that the actor knows to have been lost or mislaid.

CP 94, RP Vol 2 at 83. This instruction is based on the applicable language in WPIC 79.05. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 79.05 (4th Edition 2016). Instruction 20, the “to convict” instruction for the crime of theft in the second degree, provided the elements necessary to convict and included, “(1) That on or about February 18, 2015, the defendant appropriated lost or misdelivered property of another.” CP 101, 2 RP at 85-86.

Preston does not take issue with the instructions that were given, but argues that the instructions should have been supplemented by additional instructions defining lost or mislaid property. As stated above, these words have a common meaning that any rational juror can understand and do not require further explanation from the trial court.

Preston argues that the lack of further definitions allowed the State to argue inappropriately during closing argument and somehow lessened the State’s burden. Preston’s argument fails to look at the jury instructions as a whole. The portions of the State’s argument that Preston cites to discuss knowledge and lost property together. Instruction 10 of the trial court’s instructions defined knowledge and includes,

If a person has information that would a reasonable person in the same situation to believe that fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 91, 2 RP 83. The State's argument was based on rational inferences derived from the evidence and Preston's own acknowledgment that the property was "lost," not an undefined colloquial meaning of the word lost.

Without offering additional authority, Preston further argues that the trial court should have included an instruction on abandoned property. At trial, Preston made no argument that the property was abandoned.

Moreover, it is clear from the record that the Court's instructions allowed the defense to adequately argue their theory of the case. The defense's theory, from start to finish, was that Preston lacked the intent to commit a crime. In his closing argument, defense counsel stated,

"But when you look at the evidence and you look at what I talked about in opening and also what we discussed during voir dire is whether or not one of the big issues here, whether or not he had an intent to commit a crime.."

2 RP at 144. This theory was also put forward in Preston's testimony. When discussing pawning the ring, Preston testified:

“I wanted to see how long I could hold it and, you know, seeing how much, if it was real, and the next thing I had to contemplate was, you know, to try to find the owner, you know, if it was real it’s obviously missing..”

2 RP at 13. When asked by his counsel if he needed pawn money for something in particular Preston stated:

“Not really. But you know, I needed—I was going to be needing it trying to find the owner.”

2 RP at 14. Preston’s defense theory centered on his motivation to return the lost property.

Instructions 13, 14 and 20 were adequate recitations of the law, were not misleading, and allowed both the State and Preston to adequately argue their theories of the case. Neither the law nor Preston’s defense theory at trial required the trial court to provide further definitions of lost or misdelivered property. It was not error for the trial court to give the instructions that have been put forth in the Washington Pattern Jury Instructions: Criminal.

5. If any error occurred in the giving of jury instructions, it was harmless.

“An omission or misstatement of the law in a jury instruction that relieves the State of the burden to prove every element of the crime charged is erroneous.” State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). An erroneous jury instruction that

misstates the law is subject to a harmless error analysis. Thomas, 150 Wn.2d at 844.

The standard for review depends on whether the court's error was constitutional or nonconstitutional. State v. Barry, 183 Wn.2d 297, 302, 352 P.3d 161 (2015). If the error was constitutional, to find harmless error, the court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

Where the error is not of constitutional magnitude, the rule is that error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Barry, 183 Wn.2d at 303 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In this case, the trial court properly instructed the jury as to the elements of the offense. Error, if any occurred at all, occurred in the lack of further definitional instructions. As in State v. Stearns, the trial court properly advised the jury of the elements and any error in defining terms in the elements is not of constitutional magnitude. Stearns, 119 Wn.2d at 250-251. Therefore, the proper

test for harmless error would be to consider whether, within reasonable probabilities, had the error not occurred, would the outcome of the trial have been materially affected. Given the overwhelming evidence, including Preston's own testimony that the ring was the lost property of Amacker, no prejudice can be shown from any error.

Even if the Court concluded that error existed of constitutional magnitude, the evidence presented at trial demonstrates beyond a reasonable doubt that the verdict would have been the same even if any error had not occurred. When considering constitutional error applied to omissions or misstatements as to elements in jury instructions, "the error is harmless if that element is supported by uncontroverted evidence." State v. Brown 147 Wn.2d at 341. Here, the evidence at trial was uncontroverted. The State's witnesses testified that the ring was lost and the Preston further testified that the ring was lost and that he desired to return it to its owner. Under either the nonconstitutional or constitutional harmless error test, error, if any occurred, was harmless.

- 6. The prosecutor did not commit misconduct by arguing the facts and rational inferences therefrom to show that Preston had knowledge that the ring was**

lost or by misstating the “reasonable doubt” standard.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). To establish prejudice, the appellant must show that the improper comments had a substantial likelihood of affecting the verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Dhaliwal, 150 Wn.2d at 578. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d

153 (1960). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

During closing argument, the prosecutor has wide latitude to argue reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011).

- a. The prosecutor’s argument that if the jury believed Preston was guilty then the State had met its burden was not a misstatement of the law.

Preston challenges the portion of the prosecutor’s closing argument in which she said, in context:

Reasonable doubt. Again, we talked about this a little bit in voir dire, and I jokingly referred to it but only partially jokingly. [Defense counsel] says he likes to think of himself as a normal person. Lawyers always like to think of ourselves as normal people, but prior to coming in here I would say that you were normal people. Nobody talks like this. Nobody says “an abiding belief in the truth of the charge” except lawyers. That’s the language that we use, so we’ve now ruined you when you go home to your families at the end of this and you’re saying, “well, I don’t know, I just didn’t have an abiding belief in the truth of the charge, or I really had an abiding belief in the truth of the charge,” they’re going to look at you, like what are you talking about, what does that even mean?...

2 RP at 97.

So when we talk about it, what does abiding mean? Long-term, longstanding. And belief, obviously you know what a belief is. Truth in the charge. So in whole, what does that mean? I would submit to you that means at the ends of today or the end of your—tomorrow, whenever you finish deliberations, do you believe that the defendant did what he was charged with. Tomorrow morning or the next day when you wake up, do you believe the defendant did what he was charged with. Next month, next year, five years from now, do you believe that the defendant did what he was charged with. That's the reasonable doubt. And it's not the same thing as any doubt or all doubt. Of course, as we talked about in voir dire, you've got 12 people in deliberating. There's no way, and that's the reason, I would submit to you, that that's not the responsibility of the State, that's not the legal standard, beyond any doubt, because everybody comes in with that different set of common experiences. But whether or not you have a reasonable doubt, an abiding belief in the truth of the charge...

2 RP at 97-98.

And sometimes you'll hear in a case or on TV somebody comes back and says, "Well, you know, I really believe that they did it, I just really believe that, but they didn't prove it to me." And when I hear that, what I hear is, oh, you applied the wrong standard because you can't come out of the courtroom—remember when you come in here you're a blank slate, you don't know anything about this case. You know nothing. So the only information you got about that case was from the witness, from the exhibits, from the testimony and evidence. So if you walk out and say, "Well, I really believe he did it," that's an abiding belief in the truth of the charge. So you can't say, "Well, I believe he did it, I really, really believe he did it but they didn't prove it," because to me that says you're applying the wrong standard. If you don't

believe in the truth of the charge, then you don't have an abiding belief in the truth of the charge, but if you believe then you do, and I have met my standard of beyond a reasonable doubt.

2 RP at 98.

Preston seems to argue that when the prosecutor told the jury that if it believed he “did it,” she was somehow lowering the State’s burden. Appellant’s Opening Brief at 37. That simply mischaracterizes the prosecutor’s argument. She merely said that if the jury believed Preston “did it,” i.e., committed the crimes on which the jury was instructed, the State had met its burden of proof. There is nothing in the argument to lead to the conclusion that the prosecutor was arguing that even if Preston’s conduct did not meet every element of the offenses the jury would be satisfied beyond a reasonable doubt.

The prosecutor in State v. Thorgerson, made a similar argument. That prosecutor argued that if the jury believed the victim it must find Thorgerson guilty “unless there is a reason to doubt her based on the evidence in the case.” Thorgerson, 172 Wn.2d. at 454. The prosecutor also said that the jury could not say they believed her but still acquit the defendant. Id. The Supreme Court held this not to be misconduct. Id.

Here, the prosecutor's statement was "If you don't believe in the truth of the charge, then you don't have an abiding belief, but if you believe then you do, and I have met my standard beyond a reasonable doubt." 2 RP 98. The prosecutor's statement is consistent with the law and is a proper argument based on WPIC 4.01. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (4th Edition, 2016), at 93. WPIC 4.01 is the instruction that trial courts have been directed to exclusively use for instructing on reasonable doubt. State v. Bennett, 161 Wn.2d 303, 317-318, 165 P.3d 1241 (2007). No improper arguments were made based on the reasonable doubt standard.

b. The prosecutor did not make improper arguments that misstated the law.

During closing argument, the prosecutors arguments that Preston knew the ring was lost property and that any reasonable person who found the ring would know it was lost were consistent with the law and the facts of the case. Consistent with WPIC 10.02, the jury was instructed,

"a person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result at it is not necessary that the person know that the fact, circumstance or result is

defined by law as being unlawful or an element of a crime.

If a person has information that will lead a reasonable person in the same situation to believe a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact, when acting knowing as to a particular fact, it is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.”

2 RP 83-84; CP 91; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (4th Edition, 2016), at 222.

The prosecutor in closing arguments has wide latitude to argue reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d at 453. The evidence clearly supported the prosecutor’s arguments. Preston indicated that he wanted to find the owner and tried to look on the internet and a third party was able to find the Craigslist ad. 2 RP at 29. When Preston pawned the ring, he did hid the fact that he had found a lost ring and told McClanahan that the ring belonged to his girlfriend in Texas. 1 RP at 90. A rational inference can be drawn from Preston’s deception, that he knew that the ring was lost and he did not have an ownership interest in it. Preston’s actions after finding the ring which were described to the jury and shown on video also allow for

inferences to be made that he knew, or should have known that the property was lost. 1 RP at 103-104.

Preston's own testimony established that he knew the ring was lost. When asked, "So you found something that somebody had lost, correct," Preston responded "I'm believing that, yes, at that point initially." 2 RP 30. The prosecutor's arguments during closing argument were not improper and there was no prejudice.

7. Preston received effective assistance of counsel based on tactical decisions.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d at 77-78; State v. McFarland, 127 Wn.2d at 334-35. The record in this case does not support Preston's claim that he received ineffective assistance of counsel, nor does Preston show prejudice based on ineffective assistance of counsel.

- a. Preston's trial counsel did not fall below an objective standard of reasonableness by not objecting to definitions in the committee approved pattern jury instructions and not offering non-pattern jury instructions that did not support Preston's theory of the case.

Looking at an alleged instructional error through the lens of ineffective assistance of counsel does not transform it into a different claim; the claim remains one of instructional error. In re Pers. Restraint of Wilson, 169 Wn.App. 379, 388, 279 P.3d 990 (2012). For many of the same reasons addressed earlier in this brief regarding instructional error, Preston cannot show that his counsel's performance fell below an objective standard of reasonableness and cannot show prejudice based on trial counsel not proposing additional jury definitional jury instructions.

The Washington State Committee on Jury Instructions "writes pattern jury instructions to assist the trial judge and the attorneys in preparing clear, accurate, and balanced jury instructions for individual criminal cases." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 0.10 (4th Edition, 2016), at 4. Pattern jury instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state. State v. Bennett, 161 Wn.2d at 308. Here,

the trial court properly used the WPIC definitions of theft and “appropriating or misdelivering property.” “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168, 1171 (1978).

It is not unreasonable for a defense attorney to rely on WPIC definitional instructions. This is especially true when the defense tactic, or theory of the case, is not affected by any additional instruction. Here, the defense trial theory was that Preston knew that the ring was lost and intended to return it. That was clear throughout Preston's testimony. Adding additional non-WPIC instructions regarding lost or abandoned property would not add to that argument and was not necessary for the defense theory of the case at trial. The fact that Preston's trial counsel did not propose such instructions was not ineffective, rather the decision was tactically based on the defense theory that Preston's intent throughout was to return the ring to its proper owner. Given the law and the Pattern Jury Instructions, it is unlikely that many defense attorneys would have taken the course that Preston now argues should have been taken. The tactics employed by Preston's trial counsel should not be second guessed.

Moreover, additional instructions as proposed by defense counsel would not have been helpful to Preston at trial because Preston himself testified that the ring was lost and he intended to

return it to its owner. Given Preston's testimony there can be no prejudice from counsel's inaction with regard to the instructions that Preston now indicates should have been given. The verdict would not have been different even if additional definitional instructions had been included.

"Trial counsel does not guarantee a successful verdict, State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978), and competency is not measured by the result. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)." State v. Thomas, 109 Wn.2d 222, 228-29, 743 P.2d 816 (1987). The jury made a credibility determination and found Preston's defense not credible. He cannot now claim ineffective assistance because his counsel did not pursue a defense theory that was inconsistent with his own testimony.

- b. Preston's trial counsel was not ineffective for failing to make frivolous objections to the State's proper closing argument.

"Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible

professional legal conduct.” United States v. Necoechea, 986 F.2d 1273, 1281 (1993), *citing to* Strickland v. Washington, 466 U.S. at 689).

As stated above, the prosecutor’s statements during closing argument were proper. Preston’s trial counsel was not ineffective because he did not object to the prosecutor’s proper closing argument. Counsel’s failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggs, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

Preston’s trial counsel was within the wide range of permissible professional legal conduct expected of trial attorneys and his decision not to object during the State’s closing argument was neither ineffective nor prejudicial.

c. Preston’s trial counsel was not ineffective for failing to object to trial testimony.

Preston argues that his trial counsel should have objected to testimony from the State’s witnesses on the basis the evidence was not relevant to the crime charged. Preston fails to consider that the crime of theft in the second degree requires a showing that the theft was committed with the intent to deprive the owner of the property.

He also ignores that the defense trial tactic was to show that Preston did not intend to deprive the owner of the property, rather he intended to return the property to its owner.

"Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted). Preston first argues that his attorney should have objected to Amacker's testimony about her attempts to get Preston to help her retrieve the ring. 1 RP 56-59. This testimony directly related to whether or not Preston intended to deprive Amacker of the value of the property. The fact that he haggled with Amacker over the offered reward was relevant to his intent. The testimony related to a material element of the offense and was not objectionable.

Even if such testimony were objectionable, it would not make sense to object where it was the defense's tactic to show that Preston's intent was to return the property. On cross examination of Amacker, Preston's trial counsel asked, "he gave you the location where the ring was on the 19th or, excuse me, on the 20th, correct?" 1 RP 64. That questioning tactically set up Preston's later testimony that he intended to return the ring and an objection to the

State's questioning would have been incongruous with the questioning on cross.

Preston next argues that his trial counsel should have objected to Lt. Brenna's testimony regarding Preston's demeanor while speaking with him. 1 RP 116-117. Lt. Brenna put his observations in context, testifying:

"Initially, I guess manipulative comes to mind. Kind of trying to steer me away from certain details. He was providing lots of details about the sandwich that he purchased and his other actions within the store. When I asked about him not turning the ring in or contacting any employees, as the conversation went on he became a little bit more agitated."

Id. Lt. Brenna later testified that Preston stated he had a family member who was a prior police officer and commented that he was not naïve about the law. Id. In context, Lt. Brenna's testimony explained the nature of his conversation with Preston. Preston's demeanor during that conversation was relevant to the issue of determining his knowledge and intent. On cross examination, defense counsel explored the conversation between Lt. Brenna and Preston, successfully leading Lt. Brenna to characterize parts of the conversation as a debate. 1 RP 121.

It is clear from the entirety of the record that Preston's trial counsel was attempting to show conflict between Preston and Lt.

Brenna in an attempt to show bias. The decision not to object to the State's questioning was tactically related to defense counsel's cross examination of Lt. Brenna. Moreover, consistent with the defense theory, Preston testified about the "debate" he had with Lt. Brenna and stated that he felt that they were "hitting him over the head pretty hard." 2 RP 19. This evidence was clearly presented to show the defense theory that Preston intended to return the ring, but was not able to work with Amacker and Lt. Brenna to do so.

Finally, Preston argues that his counsel should have objected to the State's question on re-direct examination of Lt. Brenna, "and had the defendant returned the property, did it make him any less, by your opinion, in violation of the law?" To which, Lt. Brenna answered, "No." 1 RP 124. Such opinion testimony is generally objectionable. ER 701. However, Preston's counsel had opened the door to such testimony in his cross examination, the record shows that he knew he had opened that door, and he had done so tactically.

Raising a subject on cross-examination may waive an objection to later testimony about the same manner. State v. O'Neal, 126 Wn.App 395, 409, 109 P.3d 429 (2005). During his

cross-examination of Lt. Brenna, Preston's trial counsel took great lengths to demonstrate that Lt. Brenna did not arrest Preston and would likely not have submitted the case to the prosecution had Preston returned the ring. 1 RP 121-122. Specifically, defense counsel asked, "If he had gone and retrieved the ring and given it back to Ms. Amacker, would you have referred him to the prosecutor for criminal charges?" Brenna responded, "Probably not. I can't say 100 percent for sure because often times I will still forward a report just for a determination." 1 RP 122. After the re-direct question that Preston now assign's error to, Preston's defense counsel engaged in a re-cross that concluded again with Lt. Brenna stating that he would likely not have arrested Preston based on the information that he had, but would likely have referred the matter to the prosecutor. 1 RP 128.

After a brief second re-direct examination, defense counsel demonstrated that he was acting tactically by stating, "We keep can going back and forth but no questions, your honor." 1 RP 130. In closing his closing argument, defense counsel discussed the testimony of Lt. Brenna, stating:

"we also had a brief exchange about what he did afterwards. He had completed his investigation and what he did, in fact, was forward or referred the case

to the prosecuting attorney to see if charges were going to come out of it...”

2 RP 140. Defense counsel later added,

“when pressed further, asked him if he was standing right in front of you---because we got side tracked about whether or not he could find him. If he’s standing right in front of you would you have arrested him right then for the charges, and he said probably not....”

Id. He went on to state,

“at the conclusion of the investigation, with what he had, the information that he had, even if Mr. Preston was standing right in front of him he wouldn’t have arrested him for any criminal charge. That’s pretty important.”

2 RP 141.

Preston’s defense counsel made tactical decisions which set up a scenario where he was able to imply that the testifying police officer either did not think a crime had occurred, or did not think the offense was worthy of arrest. Defense counsel also tactically set up the defense theory that Preston wanted to return the ring, but due to personality issues agitated both Amacker and Lt. Brenna to the point where he was unable to give the ring back. In closing, defense counsel argued,

“You saw the exchange between [the prosecutor] and Mr. Preston. I will submit that looking at that testimony can tell you a lot about why we’re in

court today in terms of why the case is at where it's at. I think Mr. Preston has been successful in agitating a lot of people in regard to this case. That's with Ms. Amacker, that's with the officer involved, that's with his responses while he was on the bench or, excuse me, at the witness stand.

"But when you look at the evidence and you look at what I talked about in opening and also what we discussed during voir dire is whether or not one of the big issues here, whether or not he had an intent to commit a crime on the 18th of February and the 19th of February."

2 RP 143-144.

Counsel's decisions during trial tactically set up the defense theory of the case. "As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction." State v. Adams, 91 Wn.2d at 91. Preston's trial counsel's conduct is easily explained by tactical and strategic justification. Counsel's performance did not fall below the objective reasonableness expected and counsel's tactical presentation of the defense theory of the case did not prejudice Preston.

8. Preston Requests That the Court Not Impose Appellate Costs, and the State Does Not Contest


Finally, because Preston was found to be indigent at the trial court level, he argues that appellate costs should not be imposed. Brief of Appellant at 36. The State does not contest.

D. CONCLUSION.

The trial court properly instructed the jury as to the law. Nothing in the law requires the trial court or defense counsel to offer extra definitional instructions regarding “lost” and “abandoned” property. The prosecutor’s comments during closing argument were proper and applied the law to the facts presented and the rational inferences therefrom. Preston’s trial counsel effectively, tactically and strategically worked to present the defense theory of the case. The State asks that the court affirm Preston’s convictions.

Respectfully submitted this 8 day of September, 2017.

JON TUNHEIM,
Prosecuting Attorney



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on
the date below as follows:

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I certify under penalty of perjury under laws of the
State of Washington that the foregoing is true and correct.

Dated this 8th day of September, 2017, at Olympia,
Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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